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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5881

ALICIA MORALES, *et al.*,
Petitioners,

v.

JAMES TURMAN, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, CHILD WELFARE LEAGUE OF AMERICA, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, AND AMERICAN ASSOCIATION ON MENTAL DEFICIENCY IN SUPPORT OF PETITION FOR A *WRIT OF CERTIORARI*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Counsel for the American Orthopsychiatric Association, American Psychological Association, Child Welfare League of America, National Council on Crime and Delinquency, and American Association on Mental Deficiency respectfully moves for leave to file the attached brief *amici curiae* supporting petitioners' request for a *writ of certiorari* in this case. The consent of counsel for the pe-

titioners has been obtained. Counsel for the appellants-defendants below would not consent to the filing of this brief.

This case, in which *amici curiae* have participated at both the trial and Court of Appeals levels, involves a constitutional challenge to the conditions in juvenile reformatories in the State of Texas. After a six week trial and voluminous findings by the trial judge, and after several months of negotiations on a decree to remedy constitutional defects, the Court of Appeals for the Fifth Circuit ruled that the case should have been tried before a three-judge court under 28 U.S.C. § 2281. The propriety of that ruling is now being challenged by petitioners in their request for a *writ of certiorari* in this Court.

The *amici* organizations, described more fully in the attached brief, represent over one hundred thousand professionals and citizens vitally concerned with the effects upon juveniles and upon society of the manner in which juveniles are treated when they are committed to state custody for delinquent acts or misbehavior. They believe that when executive and legislative action fails to protect institutionalized juveniles from deprivation of basic constitutional rights, courts must assume that protective role and they have accordingly participated in this litigation for over four years to advance that purpose. They file this brief because they believe that if cases involving unauthorized acts of neglect and brutality by

state officials toward institutionalized juveniles are made subject to the three-judge court requirement, the ability of the courts to perform that function will be greatly diminished with consequent lasting harm to committed juveniles and to society.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are five national organizations [1] concerned with the adequacy of conditions and programs in juvenile institutions. They have actively participated in the trial

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[1] The American Orthopsychiatric Association is an interdisciplinary organization of 4000 members including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of abnormal behavior; the American Psychological Association is a professional organization of 40,000 psychologists, a substantial portion of whose members are involved in the delivery of mental health care to juveniles; the Child Welfare League of America is a federation of 370 local child welfare leagues, concerned with the quality of services to children and adolescents in institutions and in the community; the National Council on Crime and Delinquency is a 60,000 member organization devoted to effective criminal and juvenile justice through improved rehabilitation services; the American Association on Mental Deficiency is a professional organization of 9,000 members, committed to improvements in the care and treatment of the mentally deficient, incuding institutionalized adolescents.

and appeal of this case since its inception in 1972. With court permission, they have presented expert witness testimony on conditions in the Texas Youth Council institutions and on the minimal requirements for healthy growth and development of children in state custody; they have also shared in the briefing and argument of the case on appeal. Their interest in this case is in insuring humane care and provision of adequate and appropriate services and treatment for juveniles committed to state custody.

QUESTION PRESENTED

Whether the trial of an action by juveniles challenging unconstitutional acts by state correctional authorities for which no authority can be found in state statutes or orders requires a three-judge court under the now repealed 28 U.S.C. § 2281.

STATEMENT OF THE CASE

In 1972 petitioners, juvenile inmates of five reformatories operated by the Texas Youth Council (TYC), filed an action in the United States District Court for the Eastern District of Texas alleging, *inter alia*, widespread practices of physical abuse, racial segregation and ethnic discrimination, inadequate medical and psychiatric care, substandard educational and recreational programs, lack of individualized rehabilitation, excessively harsh discipline and cruel and unusual punishments arbitrarily inflicted without due process of any kind. (*Morales* v. *Turman*, Civ. Act. No. 1948, E.D. Tex. 1971, Second Amended Complaint pars. 35-116). The thrust of their complaint was that the TYC institutions were operated in such a way as to flaunt the statutory purpose of rehabilitation mandated by the Texas legislature and to deny the juvenile inmates Eighth and Fourteenth Amendment rights

to due process and protection from cruel and unusual punishment. The complaint sought injunctive relief against the alleged unlawful acts and asked the court to require the defendant state officials to submit a plan whereby the juveniles would be assured that the unconstitutional acts and omissions would be rectified. No state statute, administrative order, or official rule, regulation, or policy of any kind was challenged in the complaint.

Prior to trial the defendants sought a three-judge court under 28 U.S.C. § 2281. In their pre-trial motion they pointed to two state statutes authorizing compulsory attendance at religious services and uncompensated labor as under attack. The trial judge, in denying the motion for a three-judge court, severed for separate trial those allegations involving these two statutes. In open court, he specifically asked defendants' counsel to identify any *other* rule, regulation, order or statute under attack. Defendants' counsel was able neither then nor at any later point in the trial to name any other statute or order in jeopardy. The case accordingly proceeded to a six week trial (70 witnesses and 6,000 pages of trial transcript) before a single judge. *Morales* v. *Turman*, 383 F. Supp. 53, 60-64 (E.D. Tex. 1974).[2]

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[2] In the pretrial order plaintiffs formulated the issues in terms of whether "the rules, regulations, practices and policies of the TYC" violated federal constitutional rights. *See Morales* v. *Turman*, 535 F.2d 864, 867 (5th Cir. 1976). In fact, no such official rules, regulations or policies of the TYC were ever discovered or identified by plaintiffs or defendants before or during trial. In addition, the following Stipulations were entered into by the parties in the same pretrial order:

> 9. Policies of the Texas Youth Council are set forth only in the minutes of the Council meetings. When specific policies are relayed to institutional personnel, it may be by memorandum or word of mouth.
>
> 10. Superintendents of individual schools in the TYC system exercise wide discretion in formulating the programs, services, policies and rules in their respective schools. The institutions

Upon completion of the trial, the court found pervasive and widespread violations of juvenile inmates' constitutional rights under the Eighth and Fourteenth Amendments. It ordered the parties to negotiate a plan that would alleviate those violations and constitute a *bona fide* attempt at a genuinely rehabilitative program for incarcerated juveniles. *Morales* v. *Turman*, 383 F. Supp. at 126.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed that judgment, ruling that the action should have been tried before a three-judge court under 28 U.S.C. § 2281. That court acknowledged that the complaint challenged no state statute as unconstitutional and that "there appeared to be no central body of written regulations governing all TYC institutions, and that the regulations and policy directives of the TYC were scattered among minutes of TYC Board meetings, Attorney General's opinions and other such sources, which had never been collected or indexed," and, furthermore, that "vast differences" in policies and procedures characterized different TYC institutions, 535 F.2d at 871. The court, nonetheless, cited several facets of the TYC operation, disclosed by the evidence *at trial*, as representing "broad generally applicable policies" of the TYC operation affected by the challenge and by the contours of relief set out by the trial judge as the bases for negotiation. These "policies" included, in the appellate court's own words, TYC's reliance on "large rural institutions" rather than community based treatment facilities, "extended solitary confinement and excessive corporal punishment without adequate procedural safeguards," and "failure to provide minimally adequate academic and vocational education." It concluded that this "set of practices and policies . . . taken as a whole, constitute Texas' statewide program for dealing with juvenile delinquents," 535 F.2d at 871. Hence, despite the clear language of the governing Texas statute that the purpose of juvenile commitments was "to provide for the care, the protection and the wholesome moral, mental and physical development of children" and to provide for juveniles in state custody "a program of treatment, training and rehabilitation," [3] these contradictory practices must be viewed as the real state policy, "*as applied and implemented*," 535 F.2d at 870. Their challenge, accordingly, necessitated the invocation of a three-judge court.

vary one from another in their mail censorship, home furlough, visiting and disciplinary practices and in the amount of on- and off-campus freedom allowed. Institutional superintendents select the employees for their respective institutions.

ARGUMENT

This petition for *certiorari* presents a single clearly-defined issue: the legitimacy of an unprecedented extension by the Court of Appeals of the three-judge court provision in 28 U.S.C. § 2281 to a class of litigation which it was never intended to cover; suits by institutionalized juveniles to remedy constitutional deprivations unauthorized by state statutes or official rules. The three-judge court provision, in the words of Justice Frankfurter, was designed as "an exceptional procedure for a well-understood type of controversy," *i.e.*, federal injunctive actions against state statutes or state regulatory commission orders. It was never intended to be "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States*, 312 U.S. 246, 251 (1941).

To bring this procedural device into play—to dislocate the normal operations of the system of lower

[3] *See* Vernon's Texas Civil Statutes, Art. 2338-1; Art. 5143(d) §§ 1, 19, 21, 23(a); Vernon's Texas Family Code, Title III § 51.01 (replacing Art. 2338-1); *cf. Smith* v. *State*, 444 S.W.2d 941, 944 (Tex. Civ. App. 1969) ("purpose of our statutes . . . [is] the education, treatment and rehabilitation of the child. . . .").

> federal courts . . . requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an "administrative board or commission". The crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's *legislative* policy. [312 U.S. at 251 (emphasis supplied)]

The Court of Appeals' untoward application of such a limited-purpose statute to a civil rights action challenging unconstitutional practices of state custodians, sanctioned in no state law or published order, rule or regulation, is without apparent precedent in this Court or in any other circuit. It contradicts the legislative history of 28 U.S.C. § 2281 as well as over 65 years of its judicial construction, and it promises to wreak havoc with the management of judicial resources in the Fifth Circuit and in this Court. It has mischievious consequences for the fate of litigants and their counsel, engendering confusion, arbitrariness and inequitable results without regard to the merits of the case or the skill of counsel. It is, consequently, worthy of review and reversal under Supreme Court Rule 19 as a case where a "Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter . . . has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

I. THIS COURT SHOULD GRANT *CERTIORARI* AND HOLD THAT 28 U.S.C. § 2281 REQUIRES A THREE-JUDGE COURT ONLY WHEN AN IDENTIFIABLE STATE STATUTE OR OFFICIALLY PROMULGATED STATE ADMINISTRATIVE ORDER, RULE OR REGULATION IS CHALLENGED.

(1) The legislative history of 28 U.S.C. § 2281, as amended in 1913, evidences a limited and specific target for three-judge courts: legislatively declared or delegated policy. In the words of this Court, "the purpose of the [1913] amendment, as stated by Mr. Clayton, who had charge of the bill in the House, was 'to put the order of a State railroad commission upon an equality with a statute of a State; in other words, to give the same force and effect to the order of a State railroad commission as it accorded under existing law to a State statute.'" *Ex parte Williams*, 277 U.S. 267, 273 n.1 (1928); *see also* H.Rep. No. 1584 reprinted in 49 Cong. Rec. 4773, 62d Cong. 3rd Sess. (1913). The 1913 amendment was enacted to extend the three-judge court requirement to federal injunctive actions aimed at the written and published orders of an administrative agency to which the state legislature had delegated rule or rate-making power. Nothing could be farther removed from that aim than applying the law to *ad hoc* administrative interpretations by a state agency head or his subordinates under a broad enabling statute when those interpretations have never even been committed to writing or subjected to the crucible of public exposure and the legislature is itself unaware that they exist. It is noteworthy that the TYC "policies" challenged in this case have been explicitly repudiated by the Texas legislature,[4] and that, although

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[4] *See, e.g.*, Report of House Committee on Human Resources, Interim Study on Child Caring in Texas, House of Reps. Tex., 63rd Leg., 1973-74, 9, 11-12, which refers to the "unnacceptable conditions" in TYC institutions and characterizes them as "giant, rural juvenile prisons."

the Texas legislature has declared it to be the public policy of the state to commit agency practices and procedures involving private rights to public inspection, no policy or practice involved in this suit was ever the subject of such publication.[5]

(2) The decisions of this Court interpreting 28 U.S.C. § 2281 have made it eminently clear that the constitutionality of a specific state statute or administrative order, on its face or as applied, must be challenged if an action is to require a three-judge court. It is not sufficient to invoke three judges that state officials have taken unauthorized and unconstitutional actions "under color of" state law, if the state law is acknowledgedly constitutional on its face and the constitutionality of its direct application to a particular individual or situation is not the issue in the case. *Compare Ex Parte Bransford*, 310 U.S. 354 (1940)[6] and *Phillips* v. *United States*, 312 U.S. 246 (1941).

The *Phillips* case enunciated the cardinal principle of construction applicable here. A challenge limited to the actions of a state official (in *Phillips*, the governor; in

[5] *See* Vernon's Texas Civil Statutes, Art. 6252-13 (1970) then in effect but since repealed and replaced by Art. 6252-13(a) (1975 Supp.) (Administrative Procedure and Texas Register Act).

[6] *See* 310 U.S. at 359.

> The validity of the statute itself is not involved. Variations by assessors in valuations of like property, taxable under the same statute, sufficiently marked to be discriminatory under the Constitution or valuations so large as to be confiscatory cannot properly be said to be the basis for attack on the ground of the unconstitutionality of the statute. Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirements of the statute itself.

The Court of Appeals' reasoning, 535 F.2d at 871, that the delegation of discretion to individual reformatory superintendents to make their own policies was itself a statewide policy invoking 28 U.S.C. § 2281 is clearly at odds with *Bransford*.

Morales, the TYC leadership) who violates federal constitutional rights by misconstruction or misuse of legitimate state statutory authority does not require a three-judge court.

> Some constitutional or statutory provision is the ultimate source of all actions by state officials. But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the Congressional scheme of § 266. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action. But the enforcement of a "statute," within the meaning of § 266, is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness. [312 U.S. at 252]

Cf. Sterling v. *Constentin*, 287 U.S. 378 (1932).[7]

(3) The putative source of the Fifth Circuit's overly expansive interpretation of 28 U.S.C. § 2281 lies in a

[7] In *Phillips* an Oklahoma constitutional provision allowing the governor to call out the national guard was not challenged but only the circumstances under which the governor exercised the authority; in *Sterling*, a comparable state constitutional provision was attacked as permitted an interpretation allowing the challenged action and additionally it was assumed by the Court that it did so. *See* 287 U.S. at 393. *See also Ex Parte Bransford*, *supra*, 310 U.S. at 361.

> It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action.

few cases, clearly distinguishable from this one, requiring three judges in attacks upon state laws which, while not alleged to be invalid on their face, are challenged as unconstitutional when "applied" to particular situations.

These were cases like *Query* v. *United States*, 316 U.S. 486, 490 (1942) and *Department of Employment* v. *United States*, 385 U.S. 355 (1966), where state taxes were challenged as unconstitutional when levied against United States Army Post exchanges or other alleged federal instrumentalities. *See also Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10 (1930). In such cases the statute or order whose application was challenged was clearly identified and those officials enforcing it were unequivocally viewed as acting under the authority of the order or statute when they attempted to apply it. The result was different, on the other hand, when the issue was defined in this Court as one of whether officials were properly constructing a statute as justifying their allegedly unconstitutional actions. *Hobbs v. Pollock*, 280 U.S. 168 (1929); *cf. Ex Parte Williams*, 277 U.S. 267, 271-272 (1928).

From such unlikely precedents, the Fifth Circuit has constructed a theory that the three-judge court provision applies to all challenges to administrative actions, whether or not sanctioned by statute or written order, if the court decides—before or *after trial*—that the challenged actions represent statutory policy "as applied and implemented." Under this theory, the administrative actions in question may have no relationship to the legislative intent; they may be carried out behind closed walls undetected by public or press, they may never be committed to written or formalized form. And, as happened in this case, officials' acts may be labelled as statewide "policy" even when they are, on their face, perverse and unreasonable, *i.e.*, "*failure to provide* minimally adequate academic and vocational *education*" in the face of a state

statute which required "*education* . . . of the child." (Emphasis supplied.)[8] There is, under such a theory, no way for counsel or his client to tell at the time the complaint or answer is filed if the challenged administrative acts will subsequently—in the light of evidence adduced at trial—be viewed by the court as reflecting the statute "as applied and implemented," or only as the excesses of misguided or malevolent individual state officers. They must proceed at their own risk.

Amici curiae urge this Court to repudiate so arbitrary and ungrounded an interpretation of 28 U.S.C. § 2281 and to explicitly limit its application in cases filed prior to its repeal to direct attacks on state statutes or duly promulgated administrative rules or orders challenged as unconstitutional on their face or as applied to specific situations.[9]

(4) No other Court of Appeals has adopted an expansive interpretation of 28 U.S.C. § 2281 that remotely approaches the scope of this one. *See also Baker* v. *Estelle, sub nom. Sands* v. *Wainwright*, 491 F.2d 417 (*en banc*) (5th Cir. 1973), *cert. denied sub nom. Guarjardo* v. *Estelle*, 416 U.S. 992 (1974); *Costello* v. *Wainwright*, 539 F.2d 547 (5th Cir. 1976). Other circuits have followed this Court's guidance and limited the three-judge provision to attacks upon "identifiable" statutes or written rules and regulations. These Courts of Appeals have refused to extend its mandate to unlawful actions of state officials belatedly claiming authority under obviously valid enabling legislation. The Fifth Circuit in-

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[8] *See* note 3, *supra*.

[9] *See* Currie, *The Three Judge District Court in Constitutional Litigation*, 32 U.Chi. L.Rev. 1, 45-46 (1964). "[T]he distinction between attacks upon legislative and upon administrative decisions is the heart of both *Phillips* and *Bransford*. Of all the tests suggested by these cases, moreover, this is the most completely in accord with the purpose of the three judge law."

terpretation thus stands at marked variance with the decisions of other circuits as well as those of this Court. *See, e.g., Benoit* v. *Gardner*, 351 F.2d 846, 848 (1st Cir. 1965); *Souza* v. *Travisono*, 498 F.2d 1120 (1st Cir. 1974); *Aaron* v. *Cooper*, 261 F.2d 97, 105-106 (8th Cir. 1958); *Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639, 643 (4th Cir. 1969); *Ault* v. *Holmes*, 506 F.2d 288 (6th Cir. 1974); *Doe* v. *Rose*, 499 F.2d 1112, 1114 n.2 (10th Cir. 1974); *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972).

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE IMPACT OF THE COURT OF APPEALS' DECISION WILL BE TO UNNECESSARILY REQUIRE THREE-JUDGE COURTS AND DIRECT APPEALS TO THIS COURT IN SCORES OF PENDING CASES.

The three-judge court section involved in this case, 28 U.S.C. § 2281, was repealed by Congress in August 1976 because "the original reasons for the three-judge court have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the Federal courts collaterally to review State laws, . . . the existing procedure compounds and confuses rather than simplifies orderly constitutional decision, and . . . the burden placed on the panels of judges to handle these cases on a expedited basis is onerous in view of the mounting backlog of cases of no lesser priority. . . ." S.Rep. No. 94-204, 94th Cong., 1st Sess. 8-9 (1976).

At the time of its demise, the three-judge court law had few friends.[10]

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[10] *See* Sen. Rep. No. 94-204, *supra*, at 3.

> . . . the Chief Justice of the United States, in his annual report on the state of the Judiciary to the American Bar Association, called for the elimination of the requirement for three-judge district courts. He stated:
>
> > We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist. There are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it. Remarks of Warren E. Burger, Chief Justice of the United States, before American Bar Association, San Francisco, Calif., August 14, 1972.
>
> The repeal of § 2281 was also supported by the chief judges of the Second, Third, Fourth and Fifth Circuit Courts of Appeals and the Judicial Conference of the United States, *Id.* at 3.

> The three judge court act has proven onerous. Empaneling three judges disrupts the dockets of both district and circuit courts, especially since three judge courts take precedence over all others. The complexity of the Act leads to confusing searches for the proper forum, delay, a waste of judicial resources, and added expense for litigants. Moreover, the right of direct review burdens the Supreme Court with a growing compulsory docket at the time when its case load already strains its capacity.
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> Note, *Judicial Limitation of Three Judge Court Jurisdiction*, 88 Yale L.J. 564, 565 (1976).

Since the repeal of 28 U.S.C. § 2281, however, was not made retroactive to cases already filed[11] a limited perpetuation of its disruptive effects was to be expected.[12] The effect of the Court of Appeals' decision, here, however, will be a major escalation in the number of cases it continues to control. Some notion of the awesome

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[11] P.L. 94-381 (1976).

[12] 1976 Annual Report at 116, *infra*, estimates the number of pending three-judge court cases nationwide at 100.

dimensions of its reincarnation in the Fifth Circuit alone can be obtained from the following statistics which appear in the 1976 Annual Report of the Director of Administrative Office of the United States Courts (hereinafter "1976 Annual Report").

(1) In fiscal 1976, even before the Court of Appeals' decision, the largest number of three-judge court hearings held in civil rights cases—the category most likely to be affected by the *Morales* decision—were held in the Fifth Circuit (34 or one-fifth of the total for all circuits).[13]

(2) On June 30, 1976, there were 3,018 private civil rights cases (1,001 of them class actions)[14] pending in the Fifth Circuit district courts, more than twice as many private civil rights cases and more than three times as many private class action civil rights cases as in any other circuit.[15] In addition there were 2,339 prisoners' civil rights petitions including 315 class actions pending in the courts of that circuit. An unknown but potentially substantial number of these 5,300 cases could be affected by the *Morales* ruling so as to require retrials or repetition of pretrial procedures before a three-judge court wherever the civil rights challenge might be construed as one to a statewide policy "as applied and implemented."[16]

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[13] *Id.* at 113, Table 35.

[14] *Id.* at 114, Table 36.

[15] According to the Director of the Administrative Office, civil rights litigation comprises the largest category of nonjury cases requiring trials lasting four days or longer. 1976 Annual Report at 132. *See also* Table C9, Appendix I-40, listing one nonjury prison civil rights trial in Texas as lasting 30 days.

[16] 1976 Annual Report at 120, 122, Table 38, and Table C3A, Appendix I-21. The number of private civil rights cases pending in the Fifth Circuit as of June 30, 1976 increased over 1975 by 671; the number of private civil rights class action cases by 248; prisoners' civil rights petitions by 601. *See* 1975 Annual Report at 239, Table 39; 365, Table C-3A.

Although no precise figures are available on the number of potential pending cases affected by the *Morales* holding, *amici curiae* are aware of nearly a dozen cases in the Fifth Circuit[17] involving broad challenges to conditions in jails, prisons, reformatories, mental hospitals and mental retardation facilities. While *amici curiae* are in no position to tell which ones specifically might require retrial under *Morales*, the repetition of extensive proceedings already conducted in any number of them would constitute a considerable drain on judicial time in a circuit which already has almost twice as many pending civil cases as any other circuit in the country.[18]

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[17] Were the *Morales* decision to be adopted by other circuits, the impact on judicial resources nationwide would be monumental. Civil rights cases filed in federal courts increased 19% from 10,392 to 12,329 in fiscal 1976. (1976 Annual Report at 79). On June 30, 1976 there were 12,911 private civil rights actions and 6,341 prisoner petition civil rights actions pending in the federal courts. These figures represented a 24% and 21% increase respectively in pending cases over the prior year. *Id.* at 86, Table 19. Ninehundred ten of the civil rights cases and 706 of the prisoners' petitions had been pending three years or more. *Id.* at 88, Table 21. In 1976 almost 7,000 civil rights petitions were filed by state prisoners, a 13.5% increase over 1975. *Id.* at 94, Table 24.

[18] *Jenkins* v. *Cowley* (N.D. Tex. Civ. Act. No. 3-74-394 C), *see* earlier opinion at 384 F. Supp. 441 (1974) (challenge to conditions in ten Texas mental institutions); *Ruiz* v. *Estelle* (E.D. Tex. Civ. Act. No. 5523) (challenge to conditions of confinement throughout Texas prison system); *Lamar* v. *Coffield* (S.D. Tex. Civ. Act. No. 72-H-1393) (allegations of discrimination in Texas prison system); *Lelsz* v. *Killian* (E.D. Tex. Civ. Act. No. 5-74-95CA) (right to habilitation suit against mental retardation institutions); *Gates* v. *Collier* (N.D. Miss. Civ. Act. No. GC 71-6-K), *see* earlier order at 371 F. Supp. 1368 (1973) (challenge to conditions at state prison); *Doe* v. *Hudspeth* (S.D. Miss. Civ. Act. No. J-75-36(N)) (challenge to conditions at institution for retarded); *Morgan* v. *Sproat* (S.D. Miss. Civ. Act. No. J-75-21(N)) (challenge to conditions at juvenile institution); *Newman* v. *Alabama* (M.D. Ala. Civ. Act. No. 5301(N)), *see* earlier decision at 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (challenge to inadequate medical care in prison); *Williams* v. *McKeithen* (M.D. Ala. Civ. Act. No. 71-98) (challenge to conditions in state prison); *Gary* v. *Stewart* (E.D. La. Civ. Act. No. 74-2412-C) (challenge to location and conditions of state subsidized placement of exceptional children).

Application of the *Morales* ruling in the Fifth or other circuits will, moreover, powerfully affect this Court's docket. Trial records, typically running into thousands of pages, must be directly reviewed by this Court on appeal from a three-judge court without the intermediary screening or refining of issues by a Court of Appeals. 28 U.S.C. § 1253. In 1976 there were 133 prisoner civil rights appeals [19] and 271 appeals from private civil rights actions [20] to the Fifth Circuit Court of Appeals from district courts. Thus some probably substantial portion of over 400 civil rights appeals now channelled to the Fifth Circuit Court of Appeals would inevitably be diverted to this Court for fullscale review.

In sum, an unduly expansive reading by the Court of Appeals of the now defunct 28 U.S.C. § 2281 promises to produce explosive and disruptive consequences for efficient management of judicial manpower both within the Fifth Circuit and this Court.[21] In *amici curiae's* view, this destructive result is totally without justification in law or policy.

[19] 1976 Annual Report at Table C3A, Appendix I-20.

[20] 1976 Annual Report at Table B7, Appendix I-10.

[21] Sen. Rep. 94-204 on the repeal of § 2281 stated that three-judge court cases "consume a disproportionate amount of the limited time for argument in the Supreme Court. In the period from October 1969, through November 1971, the Court heard argument of 366 cases. Of these, 80, or 22 percent were from three-judge courts." *Id.* at 4-5.

CONCLUSION

The decision by the Fifth Circuit Court of Appeals in this case will have a significant and undesirable effect upon the utilization of judicial manpower in the federal courts. Its ruling has no basis in the origin or judicial history of the three-judge court provision, 28 U.S.C. § 2281, and it contravenes the clear Congressional policy reflected in the recent repeal of that law. For these reasons, *amici curiae* respectfully request that this Court grant *certiorari* and reverse the Court of Appeals' judgment that a three-judge court is required when the unconstitutional actions of state custodians, sanctioned in no statute, rule, regulation, or administrative order, are challenged by juveniles over whom they exercise control.

Respectfully submitted,

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